IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 82

INTERNATIONAL HARVESTER CREDIT CORPORATION, *ET AL.*,

Appellants,

against

ALLEN J. GOODRICH, *ET AL.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

Statement

This is an appeal from a judgment of the Court of Appeals of the State of New York, affirming a judgment of the Appellate Division of the Supreme Court, Third Judicial Department, which upheld the constitutionality of the lien provisions of the New York State Highway Use Tax (N. Y. Tax Law, Art. 21, § 506) and adjudged that the defendants, constituting the State Tax Commission, recover from the plaintiffs by virtue of their paramount lien, superior to the liens of the plaintiffs under conditional sales agreements, the highway use taxes, penalties and interest due and owing by Eastern Cartage and Leasing Co., Inc.,

a motor carrier subject to the tax, which had accrued prior to the time the plaintiffs repossessed their trucks pursuant to the conditional sales agreements.

This was an action for a declaratory judgment submitted upon agreed facts, pursuant to Section 546 of the New York Civil Practice Act, to the Appellate Division of the Supreme Court of the State of New York, Third Department (R., 1-10). The Appellate Division, in a unanimous opinion, granted judgment to the defendants (R., 12-17). On appeal to the Court of Appeals, this judgment was affirmed without a majority opinion. One judge dissented and wrote a dissenting opinion (R., 20, 21).

The case is here on appeal, this Court having noted probable jurisdiction on October 10, 1955.

Question Presented

Whether the State of New York may prospectively limit the security interest of a conditional vendor of a truck by subordinating it to the State's lien on all of the trucks operated by the conditional vendee, a motor carrier, for all highway use taxes incurred by the conditional vendee, both prior to and during the time it operated the truck in question on the highways of the State.

The Statute

In 1949, the New York legislature, taking note of the damage caused the highway system of the State by heavy commercial vehicles operated by common carriers and the consequent additional costs necessary to construct and maintain the highways for such vehicles, created a joint legislative committee to make a detailed study of the revenues which might be raised from such commercial users

New York for many years the tax collector has been empowered to levy upon any property found in the county belonging to or in the possession of a tax debtor and this property may be sold for the payment of real property taxes (N. Y. Tax Law, § 71). The constitutionality of this section was upheld in *Hersee* v. *Porter*, 100 N. Y. 403, against the contention that it authorized the sale of the property of one person to satisfy a tax against another. At pages 409-410, the Court of Appeals said:

> "For the purpose of collecting the tax, the actual ownership, in contemplation of the statute, follows the actual possession. The possession under the statute is not merely a badge of ownership, it is title, so as to subject the property to seizure and sale for a tax against the possessor. Is the statute a violation of any constitutional guaranty? It has a very close analogy in the common law proceeding of distress for rent, which permitted the distraint of the property of a stranger found on the demised premises. The law of distress for rent was the law of this State up to 1846. The principle that the property of a stranger on the demised premises, might be distrained, was always recognized in our legislation, although its rigor was relaxed and its hardships mitigated from time to time by qualifications and exceptions. (2 R. S. 502, § 14.) I am not aware that the constitutionality of this feature of the law was ever questioned. Its validity has frequently been assumed by the courts. (*Holt* v. *Johnson*, 14 Johns. 425; *Spencer* v. *M'Cowen*, 13 Wend. 256; *Gilbert* v. *Moody*, 17 id. 354.) It is to be observed that this stringent remedy was permitted to enforce obligations between individuals. The similar remedy given by the tax laws is to enforce the sovereign and indispensable power of taxation. The section of the Revised Statutes now in question, was not an introduction by the revisers of a new remedy for the collection of taxes. The authority to seize and sell any property in the possession of a person taxed, for the payment of the tax, has been a part of the statute law of the State since 1801. * * * Each individual in the community has notice of the law, and is presumed to under-

of the State's highway system (Assembly Resolution (1949) No. 170). In 1951, this committee filed a comprehensive report, which found, among other things, that the existing highway tax structure, which consisted of fuel taxes and license fees, discriminated against automobiles and lighter trucks, in favor of heavier vehicles (N. Y. Leg. Doc. [1951] No. 67). The committee also found that out-of-State trucks paid little or nothing for the use of the New York highways. It concluded that immediate steps were necessary to provide additional revenue for the support of the highway system in such a manner that heavier trucks should pay a fair share of highway costs.

The Commission took note of the system of flat fees, but, despite the simplicity of administering such a tax, this was rejected because of its inequality. Consideration was given to a tax on gross earnings of motor carriers of the type which was then in force in over one-fourth of the states. This tax is customarily imposed on a base which includes that portion of the receipts from interstate commerce which is allocable to the taxing state. The committee rejected this type of tax because it is not closely connected with the extent of highway use and has a tendency to penalize efficient carriers operating with a large volume and a narrow profit margin. It was also noted that the experience in California had shown widespread attempts to evade the tax by the leasing of trucks to private shippers.

The committee concluded that a tax based on the weight-distance principle was the most equitable means of distributing the cost among the highway users. It proposed the so-called Highway Use Tax, which was enacted as Article 21 of the New York Tax Law (L. 1951, c. 74).

The committee recognized that its proposal sacrificed ease of administration and certainty of collection to the

more equitable method of apportioning the tax to highway usage (N. Y. Leg. Doc. [1951] No. 67, p. 70 *et seq.*). Effective enforcement measures were therefore included in the proposed legislation and were enacted.

The constitutionality of this tax was sustained by the New York Court of Appeals in *Mid-States Freight Lines, Inc.* v. *Bates*, 304 N. Y. 700. Certiorari was denied by this Court (345 U. S. 908).

Article 21 imposes on a "carrier" a highway use tax for the privilege of operating on the highways of New York State motor vehicles having a gross weight, alone or in combination, of over 18,000 pounds (§§ 501(2), 503).

The tax is imposed at rates fixed on a graduated scale correlated to gross weight groups beginning at 6 mills for vehicles in the group between 18,001 and 20,000 pounds and rising to 35 mills for vehicles weighing between 74,001 and 76,000 pounds, with an additional 2 mills per ton over that weight. The tax is found by multiplying the number of miles operated over the highways of the State by the appropriate weight group tax rate for the gross weight, as defined in the statute, when carrying any load and for the actual weight of the vehicle when unladen (§ 503).

Each carrier subject to the act is required to file monthly or, with the consent of the State Tax Commission, quarterly returns, reflecting the gross weight and the number of miles traveled on the highways of the State by trucks operated by the carrier. The returns reflect the tax liability of the carrier computed from the graduated scale (§ 505). The tax is due and payable at the time of filing of the return (§ 506). In the event no return is filed or the return is insufficient, the Tax Commission is authorized to make a determination of the amount of tax due from such information as is available (§ 510).

As noted above, the tax is imposed upon the carrier, which term is defined in the act as including any person having the lawful use or control or the right to use or control the vehicle (§ 503, 501(31)). It is provided, however, that where the carrier is not the owner of the truck, the tax is a joint and several liability upon both the carrier and the owner and the owner may file the necessary return (§ 503). The Attorney General of New York State, in a formal opinion dated June 15, 1954, ruled that a conditional vendor was not an owner within the meaning of the statute, since he retained legal title "as a special interest, protecting the unpaid purchase price of the vehicle" and "the transaction looks to defeasance of all his interest if completed in accordance with its terms" (1954 Atty. Gen. 219).

In recognition of the administrative difficulties involved in enforcing and collecting this tax, the statute provides extensive remedies as well as penalties, both civil and criminal (§ 512). One of the remedies afforded the State Tax Commission is the familiar tax lien and this section of the statute forms the basis of the present controversy.

> "The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit." (N. Y. Tax Law, § 506)

Another section of the statute provides for summary collection through forced sale of the vehicles subject to the lien.

"Whenever any person is delinquent in the payment of any amount due under this article the commission may forthwith collect such amount from such person by seizing any motor vehicle or vehicular unit subject to the lien of the tax and may thereafter sell it at public auction to pay the fees, taxes, interest and penalties and any costs incurred on account of the seizure and sale, after giving ten days' notice of the sale in writing to such person. The proceeds of such sale shall be paid into the state treasury to the credit of the general fund provided, however, any excess received upon the sale over the amount of the fees, taxes, interest and penalties shall be refunded to such person." (N. Y. Tax Law, § 511(3)).*

The Facts

Eastern Cartage and Leasing Co., Inc. (hereinafter called Eastern), is a New York corporation, having its principal place of business in Schenectady, New York, and from January 1, 1952, the effective date of the Highway Use Tax, through February of 1954, the period here involved, Eastern was a carrier subject to the provisions of Article 21 of the New York Tax Law (R., 2). Eastern operated at least 15 trucks on the highways of New York State during this period and incurred liability for highway use taxes under Article 21 of the Tax Law in the amount of $2,688.77 for the period between January 1, 1952 and December 31, 1953 (R., 2). For the months of January and February 1954, Eastern incurred further liability for highway use taxes in the amount of $470. These tax liabilities were unpaid and, as a result, Eastern was liable for penalties and interest thereon in the amount of $559.27, together with additional interest of 1% per month on the unpaid taxes from April 21, 1954 (R., 3).

* A 1955 amendment to this section made provision for giving notice of the sale to the owner of any such vehicle, provided he had filed with the Tax Commission a statement of his ownership.

Early in 1953, approximately two years after the enactment of the Highway Use Tax and over one year after its effective date, International Harvester Company sold Eastern two tractors, which were motor vehicles subject to the provisions of Article 21 of the Tax Law (R., 3, 5). Both of these vehicles were operated by Eastern on the public highways of New York State (R., 3, 5) and remained in the possession and control of Eastern until January 26, 1954 (R., 3, 5). As a part of the purchase price of these vehicles, Eastern executed and delivered to International Harvester Company conditional sales agreements covering each of the vehicles, and these agreements were assigned to International Harvester Credit Corporation (hereinafter called International) and were duly filed in the office of the Clerk of the Town of Rotterdam, Schenectady County, New York (R., 3, 5).

Eastern defaulted in making payments under the conditional sales agreements and both of the vehicles were repossessed by International on January 26, 1954 (R., 3, 6). Thereafter, International bid in both vehicles at a public sale and subsequently sold them to third parties, whereupon the State's lien on the vehicles for the unpaid highway use taxes of Eastern attached to the proceeds of these sales.

The plaintiff, Brockway Motor Company, Inc., engaged in a similar transaction with Eastern involving one motor vehicle, and the facts with respect to this transaction are substantially the same except that the sale took place in August of 1953 and the vehicle was not repossessed until March 26, 1954. This vehicle remains in the possession of Brockway (R., 4).

In April of 1954, the defendant, State Tax Commission, asserted against each of the three motor vehicles described

above a lien in the amount of Eastern's unpaid highway use taxes, together with the penalties and interest thereon. The plaintiffs were afforded an opportunity to obtain a release of the lien by filing a commercial bond in the full amount of the taxes, penalties and interest which had been assessed against Eastern and claimed as a lien on the trucks.

Opinions Below

The Appellate Division of the Supreme Court, Third Department, to which this controversy was originally submitted, held that the State had the power to secure its prerogative right to the payment of taxes by making that right paramount to the plaintiffs' security for their private debts and that there was no constitutional requirement to apportion the lien on the basis of the particular vehicle's actual use of the highway. During the course of its opinion, the Appellate Division said:

> "The tax is imposed on the carrier as he avails himself of the use of the State's highways. It is determined by the extent of that use, irrespective of the number of trucks employed. If he fails to pay the tax, recourse may be had to his property, a common and recognized procedure. Sound reason justifies the method of enforcing the payment of the tax adopted in this statute. It could well happen that trucks constitute the sole tangible resources of a carrier. The nature of the ownership and possession of trucks is transient. It would be neither safe, practicable nor reasonable to apportion the lien of an unpaid tax on the basis of each of several vehicles' actual use of the highway. Such a prorating or subdivision is no more to be expected than where a state seeks to collect an income tax from a nonresident by enforcing payment of the tax and considering his property and business interests in the state as a single [fol. 27] entity in order to enforce payment of the tax by lien thereon." (R., 15)

Since on the oral argument the State had conceded that its lien did not extend to taxes incurred after the repossession of the vehicles, the judgment of the Appellate Division fixed the lien for unpaid taxes on International's trucks in an amount which represented the taxes incurred by Eastern up to January 26, 1954, plus interest and penalties. The lien on the Brockway truck was fixed in the total amount of unpaid taxes, plus interest and penalties, since it was not repossessed until March of 1954.

The Court of Appeals affirmed without majority opinion. One judge dissented in an opinion which recognized the propriety of the lien priority with respect to highway use taxes incurred by the particular vehicles, but challenged the extension of such a lien to highway use taxes incurred without reference to the particular vehicles. In his dissenting opinion, Judge Van Voorhis noted:

> "In voting to modify the judgment appealed from in these respects, I do not imply that some of the objects of this part of [fol. 38] Article 21 of the Tax Law could not be realized by legislation giving effect to legitimate property rights of conditional vendors under such circumstances." (R., 21)

Argument

The proper presentation of the issue in this case requires the elimination at the outset of certain extraneous arguments which find emphasis in the appellants' brief. In the first place, the appellants' argument proceeds on the theory that their property interest in the vehicles subject to the lien is the traditional complete ownership of personal property. No recognition is accorded the fact that the carrier was the beneficial and substantial owner with possession, use and control of these motor vehicles.

Secondly, in Point I of appellants' brief, it is argued that use taxes can be imposed only in relation to benefits conferred, yet it is perfectly clear that here the issue does not involve the imposition of the tax, but rather the means employed to effect its collection. The Highway Use Tax is imposed on the carrier and, in some instances, on the owner; but never on the conditional vendor. Its constitutionality as so applied has been sustained and is here conceded. Thirdly, there is here no question involving vested rights. At the time the appellants entered into these transactions, they were presumably aware that by placing these motor vehicles in the possession and control of Eastern, a New York carrier, they were subjecting their security interest to the prior lien of the statute. Finally, there is here no question of statutory construction. The intent of the Legislature is manifest and the meaning of the lien provision is crystal clear.

Turning to the affirmative, the question which is before this Court can be considerably narrowed by giving effect to appellants' concessions and applying well-established principles of constitutional law. It is admitted that the application of the lien provisions of the statute are perfectly valid insofar as they extend to taxes which accrued as a result of the operation of the particular motor vehicles here involved (Applts' Br., p. 15). Thus, it is conceded that however the interest of appellants may be described, it is defeasible to this extent. Moreover, in the light of the precedents, it must be further conceded that the State's taxing power in this area is not restricted to the imposition of taxes measured by the actual use of the highways by specific vehicles. *Capitol Greyhound Lines v. Brice*, 339 U. S. 542. Thus, a tax in the nature of fixed fees or one measured by gross receipts was within the orbit of permissible legislative action. Had the Legislature adopted

either of these taxing devices, the appellants could not be heard to argue that their security interest was immune from the lien. *New York Terminal Co. v. Gaus*, 204 N. Y. 512. Thus, the rationale of appellants' argument is that the State, by adopting a more equitable method of allocating the responsibility for the cost and maintenance of its highways, has in effect restricted its sovereign power to ensure the collection of these taxes prior to the citizen's security for private debts.

Viewed in another light, the gravamen of the appellants' claim is that the State has no power to restrict their manner of conducting commercial credit transactions. From time immemorial, legislative bodies have seen fit to regulate such transactions in the exercise of both the taxing power and the police power. Thus, both at common law and by statute, liens such as the innkeepers' lien attached to property in possession without regard to ownership and the familiar device of distraint for rent similarly ignored this distinction. The lien for real property taxes traditionally extends to all personal property located on the premises taxed (N. Y. Tax Law, § 71). This principle has been particularly prevalent in the field of security transactions. Thus, in some jurisdictions, a conditional vendor was for many years accorded no protection of his interest against third parties. Under the Conditional Sales Act, this security interest is still subject to defeasance in many instances. It is clear, therefore, that the State has the power to regulate and restrict the use of personal property within the State and the present statute may properly be regarded as an exercise of this power. It is in effect an amendment to the Conditional Sales Act, which puts conditional vendors on notice that by placing in the hands of carriers trucks of over 18,000 pounds gross capacity, they

are subjecting their security interest in such trucks to the paramount lien of the State for the highway use taxes incurred by that carrier through the use of the State's highways. It is important to note that there is no issue in this case of the application of the lien provision to transactions entered into before it became law. True, this constitutes a restriction in some small degree on the appellants' right to conduct commercial transactions in the manner of their own choosing, but the restriction is amply justified by the urgent necessity of constructing and maintaining a State highway system adequate to accommodate motor vehicles which the appellants have a direct interest in placing on those highways.

POINT I

Appellants' property interest is in substance a security device, which may constitutionally be conditioned and restricted for the protection of State revenues.

The appellants' basic premise is that the application of the lien provisions of the New York Highway Use Tax is an unconstitutional taking of their property. It is, therefore, necessary to analyze the nature of this property interest as bearing upon the reasonableness of the lien asserted by the State.

While at common law the conditional vendor's legal title was generally paramount, the courts have always recognized the power of the Legislature to restrict and even cut off the vendor's interest in such transactions. Indeed, some states for many years failed to accord any recognition to the interest of a conditional vendor, except as between the vendor and vendee, and this practice does not appear to have raised any constitutional challenge. *Barber Asphalt*

Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193. Viewed realistically in the light of the present-day legislation and precedents, the interest of a conditional vendor must be regarded solely as a security device for the payment of a private debt. *Williston on Sales* (Rev. ed. 1948), § 330. The entire contract looks to the eventual passage of the security title to the purchaser, who acquires not a contract but a property right. Possession is delivered to the buyer and he may maintain that possession as against the world, provided he complies with the terms of the contract. This possession and use are in reality beneficial ownership, which is itself a reasonable connection between the trucks and the tax lien.

The most recent pronouncement of the New York courts on this subject is found in *Schnitzer* v. *Fruehauf Trailer Co.*, 283 App. Div. 421, aff'd 307 N. Y. 876. At page 431, the Appellate Division said:

> "The parties to a conditional sale have divided property interests in the goods. The buyer is the beneficial and substantial owner, with such attributes of ownership as possession, use and control, and has his equity of redemption sedulously guarded by the law. The seller, on the other hand, reserves title to the goods solely as security for payment or performance by the buyer. Essentially a conditional sale is only a credit device. Its plain and obvious purpose is the same as a purchase-money chattel mortgage despite technical or theoretical differences between the two forms of security.
>
> "The retaking * * * is simply for the purpose of enforcing the seller's security for the price by foreclosure of the defaulting buyer's equity of redemption."

The Uniform Conditional Sales Act, which was enacted in New York State as Article 4 of the Personal Property Law, presupposes the power of State legislatures to regulate the reservation of property in goods sold by conditional

vendors. Thus, the reservation is void as against purchasers or creditors unless the conditional sales contract is filed within a limited period of time in the proper place (N. Y. Personal Property Law, §§ 65, 66). Additional restrictions are imposed with respect to material furnished under public contracts (N. Y. Personal Property Law, § 65-a), fixtures (N. Y. Personal Property Law, § 67) and railroad equipment or rolling stock (N. Y. Personal Property Law, § 68). Moreover, in the event the conditional vendor delivers goods and either expressly or impliedly consents that the buyer may resell them, the reservation of legal title is void as to purchasers from the buyer even though the conditional sales contract has been properly and timely filed (N. Y. Personal Property Law, § 69). The constitutionality of these restrictions has never been seriously questioned.

The statute here under attack may properly be regarded as an additional restriction on the right of a conditional vendor to reserve a security interest in property which is placed in the possession and control of a third party. The enactment of this legislation was in fact notice to such conditional vendors that in the future New York State would not recognize such a reservation of title as against highway use taxes incurred by the carrier who was placed in possession of the property. The legislation was, in effect, an amendment to the Uniform Conditional Sales Act.

There is certainly nothing new or novel in legislation which subjects the interest of third parties in either personal or real property to the paramount claim of a private lien holder or the tax collector. Thus, at common law, under the familiar device of distraint for rent, a landlord could resort to all property in the possession of his tenant

for payment of the rent even though the complete title to the property was in a third person. *Holt v. Johnson*, 14 Johns. (N. Y.) 425; *Spencer v. McGarren*, 13 Wend. (N. Y.) 256. Both at common law and pursuant to statute, an innkeeper was afforded a lien against all property brought upon the premises by a guest (N. Y. Lien Law, § 181). In *Waters & Co. v. Gerard*, 189 N. Y. 362, the Court held that the innkeeper's lien attached to a piano and prevailed over the interest of a prior conditional vendor. Moreover, the lien was held to extend to sums owing for board and extras and was not confined to the amounts due for lodging alone.

A striking analogy to the lien asserted by the State in the case at bar is found in the old agister's lien, which gave to the owner of pasturage a lien upon cattle placed in his pasture for the value of the forage they consumed. This lien did not exist at common law and is the creature of statute or agreement (N. Y. Lien Law, § 183). It has been held superior to a prior chattel mortgage. *Corning v. Ashley*, 51 Hun 483, aff'd 121 N. Y. 700. Here, the State may be regarded in the role of a modern agister. The highways, like the pasturage, are being consumed by the mechanical successor to the horse. For the use of those highways, there is imposed upon the person in possession and control of the trucks a highway use tax. As security for the payment of the tax, the State looks to all of the trucks of the carrier using the highways just as the agister looked to all of the cattle using his pasture, and the rights of the holder of a security interest in either the cattle or the trucks are properly subordinated to this lien.

If the rights of private creditors may properly be preferred to the security interests of third parties, it must follow that the rights of the sovereign in the collection of its taxes should be afforded similar treatment. Thus, in

stand that if his chattels are by his consent or permission in the possession of another, they can be taken for a tax against the person in possession."

In *Minneapolis Threshing Mach. Co.* v. *Roberts County*, 34 S. D. 498, 149 N. W. 163, threshing machinery which had been assessed as part of a tax debtor's property was seized under a distress warrant and subjected to taxes assessed not only against the particular machinery, but other taxes of the tax debtor as well. The validity of the statute which authorized such action was sustained over the objection of the vendor of the machinery, who had foreclosed a chattel mortgage and reacquired title prior to the distraint. The Court stated at 149 N. W. 164:

> "This section of the statute was in effect when appellant's mortgages were executed, and is therefore controlling upon the parties to such mortgage. It became a part of the contract, and such mortgages must be treated as though the said section had been incorporated therein. The power of the Legislature to make personal taxes a paramount lien on the property of the tax debtor cannot be seriously questioned at this day. Statutes giving tax liens priority over all other liens and incumbrances are not in contravention of any constitutional prohibition."

See also:

Jordan v. *Baggett*, 165 Ga. 665, 140 S. E. 902;
Weber Showcase and Fixture Co. v. *Kaufman*, 45 Ariz. 397, 44 P. (2d) 158;
Landis Machine Co. v. *Omaha Merchants Trans. Co.*, 142 Neb. 397, 9 N. W. (2d) 198.

Appellants give somewhat grudging recognition to "the constitutional power to severely limit or curtail credit transactions in the State" (Applts'. Br., p. 25). They argue in one place that the exercise of such a power must be predicated upon a finding of public necessity and, in

another place, that the lien cannot be sustained without a finding that it is in the public interest that commercial vendors should be required to sell for cash. This Court will traditionally accord to legislative action the presumption of rationality and, certainly, the collection of additional public revenues to support and maintain the State highway system is a most urgent public necessity. With respect to the second suggested finding, it is indeed a bold speculation to assume that this lien provision requires that all commercial vehicles be sold for cash. If the credit of the operating carriers is that poor, it affords all the more justification for the steps the Legislature has taken to ensure the payment of the highway use taxes it has imposed.

The opinion of Mr. Justice Cardozo in *Burnet* v. *Wells*, 289 U. S. 670, is here particularly pertinent. This Court has made clear that in the collection of taxes, the sovereign is not constrained by refinements of title carried over from common-law concepts. At pages 677-679, Mr. Justice Cardozo said:

> "The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically, in slavery to forms or phrases. 'Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid.' [citing cases] * * * Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the grace

tical necessities of an efficient system of taxation, will have head and recognition within reasonable limits. * * * A margin must be allowed for the play of legislative judgment."

POINT II

The subordination of the reservation of legal title by conditional vendors of trucks to the tax lien is a valid exercise of the State's prerogative right to priority.

This case does not involve the imposition of a tax upon the appellants or upon the trucks in which appellants hold a security interest. The New York highway use tax is imposed upon the carrier, Eastern, and as construed by the Attorney General of New York State the appellants, as conditional vendors, have no liability for the payment of Eastern's taxes. The challenge here is directed at the means designed by the State Legislature to ensure the payment of this concededly valid tax. The issue is the State's power to prefer Eastern's tax obligation over not only its private debts but also the security interest of its private creditors.

There can be no question of the State's right to priority. Indeed, this appears to be conceded by appellants' statement that the "issue is not priority but the reasonableness of what was made prior" (Applts'. Br., p. 8). The right of the People of the State to a preference over common creditors even in the absence of statute has long been recognized in New York State as a sovereign prerogative. *Matter of Carnegie Trust Co.*, 206 N. Y. 390. Although this priority did not at common law prevail over specific liens existing in favor of private creditors, this Court has explicitly recognized the power of the New York Legislature

to make such a provision. In *Marshall* v. *New York*, 254 U. S. 380, this Court said at pages 383-384:

> "This priority arose and exists independently of any statute. The legislature has never, in terms, limited its scope; and the courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority. The only changes of the right made by statute have been by way of enlarging its scope in certain cases. Thus, while by the common law of England, *The King (in aid of Braddock)* v. *Watson*, 3 Price, 6, and by that of New York, *Wise* v. *L. & C. Wise Co.*, 153 N. Y. 507, 511, the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of New York extended the prerogative right, so as to give certain taxes priority over prior incumbrances. An extension of this nature is found in § 197 of the Tax Law which declares in respect to the annual franchise tax, that 'Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full.' By reason of that provision the annual franchise tax takes priority over incumbrances on the corporate property. *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512."

In *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512, the binding force of which was acknowledged in *Marshall* v. *New York*, 254 U. S. 380, the successor in interest to a private creditor, whose obligation was secured by a mortgage on the corporate real property, claimed that franchise taxes imposed by the State subsequent to the mortgage security were not a prior lien on the corporate property. The private creditor argued that since the franchise tax was not imposed directly upon the property of the corporation, it could not be paramount to the prior encumbrances. Despite the circumstance that the language of the statute

was far from explicit, the Court held that the State's priority prevailed. At page 516, the Court said:

> " * * * Operation, therefore, could only have been under the corporate franchise and if so, then, I think that the right of the comptroller to levy a franchise tax attached and that the tax became a lien upon the corporate assets paramount to all prior incumbrances. It was made paramount by the statute making it 'a lien upon all the real and personal property * * * until the same is paid in full.' (Tax Law, sec. 197; *Eaton's Appeal*, 83 Pa. St. 152.) It was paramount, for the reason that the tax was upon the privilege of exercising the corporate franchise and of carrying on the business, through which the company was, by its earnings, to provide for its obligations. The paramount nature of the lien is necessarily implied, and is not affected by the existence of prior incumbrances; any more than the tax would be affected by the fact that the company had operated its franchise at a loss. * * *"

In *Liford* v. *State of New York*, 140 F. (2d) 840 (C. C. A. 2d), cert. den. *sub nom. Bankers Trust Co.* v. *New York*, 323 U. S. 714, the Federal Court accorded the same effect to a lien on railroad property for moneys advanced by the State in connection with grade crossing elimination. In the succeeding case of *State of New York* v. *Gibhardt*, 151 F. (2d) 802 (C. C. A. 2d), cert. den. *sub nom. Bankers Trust Co.* v. *New York*, 327 U. S. 788, the priority of the grade crossing lien over mortgages was expressly sustained against constitutional objections based on claims of denial of due process and impairment of contract obligations. The due process objection was founded chiefly on claimed lack of adequate notice to mortgagees. The Court disposed of that contention on the ground that "the statute was notice to the mortgagees", citing *Anderson National Bank* v. *Luckett*, 321 U. S. 233, in which it was held that all

persons having property within a state must take notice of its statutes affecting the control or disposition thereof.

The relation between the tax and the protection afforded or benefits conferred by the state is of importance in determining the power to impose the tax. *Wisconsin v. J. C. Penney Company*, 311 U. S. 435. Such relationship is, however, of little or no consequence in determining the validity of the means employed to collect a tax which is conceded to be valid. That the lien need not be confined to specific property or limited to the property or income which occasioned the tax is made clear in *New York Terminal Co. v. Gaus*, 204 N. Y. 512.

See also:

Hodge v. *Muscatine County*, 196 U. S. 276;
Minneapolis Threshing Mach. Co. v. Roberts County, 34 S. D. 498, 149 N. W. 163;
State of Minnesota v. *Central Trust Co.*, 94 Fed. 244 (C. C. A. 8th), cert. den. 174 U. S. 803;
Fruehauf Trailer Co. v. State Corporation Com'n., 149 Kans. 465, 87 P. (2d) 641.

In *State of Minnesota* v. *Central Trust Co.*, 94 Fed. 244 (C. C. A. 8th), at pages 248, 249, the Court said:

> "* * * taxes levied by the state for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that necessity it has been a common practice to provide summary remedies for enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been

sustained as affording due process of law, if the proceedings had related to the collection of purely private debts.

"The state has an undoubted power to create a lien for a personal tax on other property of the tax debtor than that which was assessed for the tax, and to make the same superior to all other liens."

No attempt is made to distinguish these cases which firmly establish the State's power to subordinate the prior security lien of a private creditor to the State's lien for the payment of obligations owing it by the debtor. True it is argued that some admittedly valid taxes "cannot be broken down and attributed to separate items of property" (Appits'. Br., p. 18). This would not seem applicable to funds advanced for grade crossing eliminations which are directly expended on specific items of the railroad's property. It is submitted, however, that if serious constitutional considerations inhere in the subordination of the private creditor's lien, they are not met by the practicality of breaking down and attributing the tax to separate items of property in the possession of the debtor. In other words, if a lien provision which cannot be broken down and attributed to separate items of property is constitutional there can be no constitutional requirement that in applying a similar lien provision the State must apportion as far as practicable.

An illustration of the tenuous nature of appellants' contention is afforded by a comparison between the New York and California tax structures affecting the use of highways. In California, the highway use tax is measured on the basis of a percentage of the carrier's gross receipts from truck operations and the lien of the State for the payment of such taxes is made prior to all private liens or

encumbrances and "to the rights of any holder of the legal title" (Deering, Cal. Code §§ 10096-10098 [Rev. & Tax. Co. A.]). Obviously, this is a tax that "cannot be broken down and attributed" to separate motor vehicles employed by the carrier. In the light of appellants' concessions and the determinations in *New York Terminal Co. v. Gaus*, 204 N. Y. 512, and *State of New York v. Gebhardt*, 151 F. (2d) 802 (C. C. A. 2d), cert. denied *sub nom. Bankers Trust Co. v. New York*, 327 U. S. 788, the conditional vendor who sells a truck to a California carrier could not be heard to raise a constitutional question because its security interest was subordinated to California's lien for such taxes.

It is perfectly clear that the New York State Legislature could have adopted the gross receipts method of measuring the highway use tax. *Capitol Greyhound Lines v. Brice*, 339 U. S. 542. In fact, the Joint Legislative Committee gave serious consideration to this type of tax and made a study of the California experience. The Committee, however, discarded this type of tax structure in favor of the more equitable method of measuring highway use by weight distance standards (N. Y. Leg. Doc. [1951] No. 67). The essence of the appellants' contention is that this legislative attempt to distribute more fairly the cost of constructing and maintaining the highway system has created a constitutional restriction which inhibits the prompt and efficient collection of the tax.

The appellants attack the lien provisions of the highway use tax on the ground that they are based on the convenience of the State rather than on any finding of public necessity. The same argument might well be made against the undoubted sovereign prerogative of priority which is certainly a convenience to the State, but it cannot be doubted that the prompt collection of taxes is always a matter of

public necessity and is in fact vital to the very existence of the State. *Haggar* v. *Reclamation District No. 108*, 111 U. S. 701; *Phillips* v. *The Commissioner*, 283 U. S. 589. This prerogative right of priority "is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts". *United States* v. *State Bank of North Carolina*, 6 Peters 29, 35.

There is, of course, a well founded presumption that the New York State Legislature, which had made a thorough study of the problem, acted in a reasonable manner and took appropriate steps designed to secure the collection of this tax. If their judgment can be supported by any state of facts, either known or which could reasonably be assumed, this legislation cannot be stricken down as arbitrary. *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Williamson* v. *Lee Optical Company*, 348 U. S. 483. This presumption is amply supported by the legislative study and by the circumstances inherent in the trucking industry. The main assets of any carrier operating motor vehicles are the trucks employed in its business. Traditionally a very large percentage of the sales of this type of motor vehicle involve some security arrangement wherein the truck manufacturer and seller retain an interest in the vehicle, but place it in the hands of the carrier for the express purpose of using the highways. Since these assets are highly mobile they may easily be placed beyond the physical reach of the State. Moreover, this tax was in part designed to reach interstate carriers who were found to contribute little or nothing to the support of the New York highways. Since these carriers have no situs in the State and their trucks are in transit, it was obviously necessary to extend the tax lien to all of the vehicles of the carrier

to cover all of the taxes incurred. To confine the lien to the taxes incurred by a particular truck would indeed render this method of collection highly problematical.

In bearing on the reasonableness of the legislative action, it must be conceded that these appellants are indeed closely connected with the whole problem of highway maintenance and construction. They are engaged in the manufacture and sale of trucks and the market for their product is entirely dependent upon the construction and maintenance of an adequate highway system. Appellants' argument that they would derive more benefit from less well-maintained highways is entirely belied by the tremendous interest shown by all motor vehicle manufacturers in promoting the development of improved State highway systems. The appellants entered into the transactions involved in this case with full knowledge of the existence of the highway use tax and its lien provisions. They placed these trucks in the possession and control of Eastern knowing they were to be used on the highways of New York State. They looked to the profits that Eastern expected to earn by the use of the highways of the State to pay the balance of the unpaid purchase price of the trucks and played an integral part in all of the matters and transactions which gave rise to this tax liability.

The provision of the law which formerly prevented disclosure of information contained in the Highway Use Tax returns has since been repealed (N. Y. L. 1955, c. 165). In passing, it should be noted that nothing in either the law or the record in this case indicates that the fact and the amount of an existing tax liability would not have been disclosed to conditional vendors upon inquiry to the proper State officials. Moreover, it is well established that in such tax proceedings the statute in and of itself constitutes suf-

ficient notice. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331; *B. K. Sweeney Electrical Co. v. Poston*, 110 Colo. 139, 132 P. (2d) 443.

The fact that the State took no action to assert the taxes and determine the extent of the lien until after the motor vehicles had been repossessed raises no constitutional problem. The lien attached as of the date the motor vehicles were first operated on the highways of the State and when the extent of the tax liability was determined it related back. *New York v. Maclay*, 288 U. S. 290; *United States v. Alabama*, 313 U. S. 274.

There remain for discussion the three State court cases cited on pages 16 and 17 of appellants' brief. *Pacific Finance Corp. v. Snohomish County*, 160 Wash. 384, 295 P. 110, appears to have little relevance to the question here presented. That case involved the seizure under a tax distraint of the property of a conditional vendee. The statute created no prior lien superior to the rights of the conditional vendor and the seizure did not purport to cut off those rights, but was limited to such rights in the property as the conditional vendee might have. The Washington Court held that the conditional vendee possessed no rights in the property. In *Universal Credit Co. v. Hamminga*, 214 Ia. 1135, 243 N. W. 513, the statute again made no attempt to assert a lien priority in favor of the State against a title reserved by the conditional vendor, and the Court held, as a matter of statutory construction, that the property subject to the lien did not include the conditional vendee's interest in the truck.

In *Fruehauf Trailer Co. v. State Corporation Comm.*, 149 Kans. 465, 87 P. (2d) 641, a case dealing with the Kansas gross-ton-mileage tax, the Court had before it a lien

statute very similar to the one at bar, which made clear that the lien priority extended to all of the trucks used in the business of the motor carrier. There, the Court enforced such statute to cut off the rights of the conditional vendor. This case is squarely in point and it is interesting to note that the majority of the Court rejected the very argument here advanced—that the lien must be confined to the taxes incurred by the operation of the particular vehicle. The case cannot be distinguished upon any difference between the New York and Kansas Courts in the treatment accorded a conditional vendor and, as noted above, the fact that the lien was asserted prior to repossession is of no consequence. The conjecture of the footnote—that the Kansas Legislature was moved to modify the lien provision in the belief that the Supreme Court of its own State had misconstrued the Constitution—is hardly worthy of comment.

Conclusion

At the time the appellants entered into the transaction involving the trucks here in question, they knew that their security interest was by law subordinate to highway use taxes which had already been incurred by the buyer and to highway use taxes which would be incurred in the buyer's future operations. They willingly chose to assume this risk. Such a restriction of security title is within the legislative power. The power is here exercised to protect the revenues of the State by asserting its prerogative right to prefer its claims to private debts and the security interest of private creditors. The lien provisions are reasonably designed and essential to safeguard the collection of an admittedly valid tax and make possible the construction and maintenance of a highway system vital to the appellants' business.

It is respectfully submitted that the lien provisions of the New York Highway Use Tax are constitutional and that the judgment of the Court of Appeals of New York should be affirmed.

Dated: December 30, 1955.

Respectfully submitted,

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